Bumicrystal Technology (M) Sdn Bhd v Rowstead Systems Sdn Bhd

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 24–204 OF 2002
MOHAMED APANDI ALI JC
18 APRIL 2004

Civil Procedure — Judge — Application to recuse judge — Grounds for recuse — Test applicable — 'Real danger of bias' — Whether there was real danger of bias

This is an application made by the defendant for an order that the judge in question be recused from hearing the proceedings on the grounds that there was a possibility of bias since (i) the said judge was previously the legal advisor for UMNO and had stood as an UMNO candidate in the 1990 general election; (ii) the said judge had acted as counsel for UMNO in previous proceedings against an opposition party; and (iii) the said possibility of bias may arise as the defendant is owned by PAS-led government of the State of Kelantan.

Held, dismissing the recuse application:

(1) The most reasonable and correct test to be applied in a recuse application is the 'real danger of bias' test. Claims of the likelihood of bias alone are not enough. The possibility of bias must be real and apparent (see para 43).

(2) On the facts, the applicant failed to prove or even show on a balance of probabilities, any valid or reasonable reason for the learned trial judge to recuse from hearing and determining all further proceedings in the instant case (see para 46).

(3) The issue of recusal would only be relevant if the interaction, association and relationship of the judge creates a real likelihood of bias, in the event the judge having to adjudicate on matters involving such person, with whom the judge interacts, associates or has a relationship (see para 48).

(4) The reasonableness of the existence of the real danger of bias has to be assessed in the light of the Judges' Code of Ethics 1994 and the oath of office taken by judges' to administer justice without fear or favour (see para 52).

[Bahasa Malaysia summary

Ini adalah permohonan yang dibuat oleh defendan untuk perintah penarikan diri hakim berkenaan daripada mendengar prosiding ini atas alasan terdapat kemungkinan pendirian berat sebelah kerana (i) hakim berkenaan pernah menjadi penasihat undang-undang kepada UMNO dan pernah menjadi calon UMNO dalam pilihanraya umum tahun 1990; (ii) hakim berkenaan pernah menjadi peguam mewakili UMNO dalam prosiding-prosiding terdahulu melawan parti pembangkang; dan (iii) kemungkinan pendirian berat sebelah yang dikatakan mungkin timbul kerana defendan dimiliki oleh kerajaan yang diterajui oleh PAS di negeri Kelantan.

Diputuskan, menolak permohonan penarikan diri dengan kos:

(1) Ukuran yang paling wajar dan tepat untuk dipakai di dalam permohonan penarikan diri adalah ujian 'real danger of bias'. Dakwaan kemungkinan terdapat pendirian berat sebelah semata-mata tidak mencukupi. Kemungkinan pendirian berat sebelah mestilah nyata dan ketara (lihat perenggan 43).

(2) Berdasarkan fakta, pemohon gagal membuktikan pada imbangan kebarangkalian, sebarang alasan yang sah atau wajar bagi penarikan diri hakim bicara daripada membicarakan dan memutuskan kes ini (lihat perenggan 46).

(3) Isu penarikan diri hanya relevan sekiranya interaksi, pergaulan dan hubungan hakim mewujudkan kemungkinan bahaya pendirian berat sebelah yang ketara, jika hakim tersebut membicarakan perkara yang melibatkan orang berkenaan, dengan siapa hakim tersebut berinteraksi, bergaul atau mempunyai hubungan (lihat perenggan 48).

(4) Kemunasabahan kewujudan bahaya pendirian seberat sebelah hendaklah dipertimbangkan berdasarkan Kod Etika Hakim-Hakim 1994 dan sumpah yang dibuat oleh hakim semasa menjawat jawatan untuk melaksanakan keadilan tanpa gentar atau pilih kasih (lihat perenggan 52).]

Notes

For cases on application to recuse judge, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3158.
For the role of the trial judge, see 1 *Halsbury's Laws of Malaysia*, para [10.8-022].

Cases referred to

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd and another & Other Appeals [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)
Maleb bin Su v PP, Cheak Yoke Thong v PP [1984] 1 MLJ 311 (refd)
Metropolitan Properties Co (FGC) Ltd v Lannon and others; Regina v London Rent Assesment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd [1969] 1 QB 577 (refd)
Mohamed Ezam Bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321 (refd)
R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No. 2) [1999] 1 All ER 577 (refd)
Regina v Camborne Justices and another, ex p Pearce [1955] 1 QB 41 (refd)
R v Gough [1993] AC 646 (refd)
The Queen v Rand and others (1866) 1 LRQB 230 (refd)
The King v Sussex Justices, ex p McCarthy [1924] 1 KB 256 (refd)
Tan Kim Hor v Tan Chong & Motor Co Sdn Bhd & Ors [2003] 2 MLJ 278 (refd)

Legislation referred to

Federal Constitution art 125 cl (3A)
Judges' Code of Ethics 1994 (P.U.(B) 600) Code 3(1)

A Legal Profession Act 1976 s 46A(1)(c)
Principles of Judicial Conduct 2002 [Bangalore]

Suraeisan ST Mani (Suraeisan ST Mani & Associates) for the plaintiff.
Subayogan Sinniah (Zainal Abidin & Co) for the defendant.

B **Mohamed Apandi Ali JC:**

[1] This is an application by way of summons in chambers by the defendant (encl 64) for:

'(1) YA Hakim Mahkamah Tinggi Dato' Haji Mohamed Apandi Ali menarik
C diri (recuse) dari mendengar presiding ini.

(2) Semua tindakan dan pendengaran dalam prosiding ini ditangguh sehingga keputusan dibuat berkenaan dengan permohonan di atas.

(3) Kos permohonan ini dijadikan kos dalam kausa.

D (4) Apa-apa relif atau arahan/perintah yang difikirkan munasabah dan adil oleh Mahkamah yang mulia ini.'

[2] In short I shall refer the summons in chambers, as the 'recuse application'.

E BRIEF HISTORY OF THE APPLICATION

[3] Originally, the matter started off as appeals to judge in chambers (by both parties) against the decisions of the senior assistant registrar, identified as encl 26 dan encl 43 respectively.

F **[4]** On 20 July 2003, after written submissions were filed, and both matters were fixed for decisions, the learned trial judge, YA Dato' Sulaiman Daud recused himself from hearing the case, upon discovering that the subject matter is related to an agreement he drafted when he was then the Kelantan State Legal Adviser.

G **[5]** On 15 September 2003, I was administratively assigned to take over the hearing of all proceedings relating to this case and the said matters were then fixed for hearing on 1 December 2003.

[6] On 1 December 2003, as I was about to proceed with the hearing, the learned counsel for the defendant informed the court that he had just filed this recuse application (encl 64). It was filed at 8.34am on 1 December 2003!
H Everybody was taken by surprise. I was equally taken aback. Momentarily, I felt that such an application was an affront to my impartiality. However, my conscience reminded me that it was within a litigant's legal right to make such an application. The defendant opposed the application and requested for time to file in the affidavit in reply. The application was then fixed for
I hearing on 20 December 2004.

[7] On 20 December 2004, the plaintiff requested for time to reply to the affidavit in reply filed by the defendant. To save time, the court directed that

all affidavits pertaining to the application be filed on or before 11 December 2004 and further directed that all written submissions be filed on or before 24 March 2004 and that the court would decide on the matter (ie the recuse application) on 18 April 2004 (today).

[8] Faced with a recuse application, I felt that I was put into a 'catch 22' situation. However, I would not want to be caught in a situation as faced by my brother judge, YA Ian Chin J in the case of *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, where although the learned judge did not find any reasonable reason to recuse but in view of the application itself, decided to recuse because he feared that allegations might later be made against him. The Court of Appeal subsequently ruled that the act to recuse was wrong and directed the learned judge to hear the trial of the action.

BASIS OF THE RECUSE APPLICATION

[9] Basically, the defendant claimed that there is a possibility of bias because I was once the legal adviser for UMNO and had stood as an UMNO candidate in the General Elections (in 1990), and that I have acted as counsel for UMNO in previous proceedings against another political party, ie PAS; and the said possibility of bias may arise as the defendant is owned by the PAS-led Government of the State of Kelantan.

[10] The defendant further alleged that the plaintiff company is owned by an UMNO member and that I had acted as counsel for UMNO in various cases, including election petition cases during my practice, prior to my appointment.

[11] From the affidavit in support of the application, the defendant indicated the possibility of bias. Paragraph 7 of the affidavit in support (in encl 65) reads: '7 Saya dinasihatkan oleh peguamcara defendan bahawa kemungkinan 'bias' atau pandangan 'bias' antara lain akan mungkin timbul jika YA Hakim mendengar prosiding/kes ini.'.

THE LAW ON DISQUALIFICATION (RECUSE)

[12] Before deciding on the recuse application, it is pertinent to look at the law on the subject matter. There are two categories of disqualification, namely what is termed as automatic disqualification and the other, a non-automatic disqualification.

[13] In the automatic disqualification category, a judge is obliged to recuse, *sua sponte.* This is done or expected to be done even if no application or motion or affidavit is filed. There are cases, where it is known or shown or brought to the attention of the judge, that, he has a pecuniary or proprietary interest in the subject matter. In such circumstances, the judge has a legal duty to disqualify himself; the recusal is self-imposed and self-executed. This self-imposed recusal is based on the centuries old maxim: *nemo judex in cause sua* which in simpler terms mean that no one may be a judge in his or her own cause or in a case, which they have an interest.

[14] The second category, which is a non-automatic disqualification, a judge is not obliged to recuse. In this category, the applicant must prove the bias and the bias must be sufficient enough to affect the impartiality of the presiding judge. What is the degree of biasness to merit disqualification? This is the issue that has to be addressed. It is not as obvious as in the automatic disqualification category.

[15] The overall development of the law on this issue can be seen through the plethora of English and Malaysian cases over the years. Briefly they are as follows:

[16] 138 years ago, in *The Queen v Rand and others* (1865–1866) 1 LRQB 230 at p 232, Blackburn J said:

> a real likelihood of bias must be proved to exist before proceedings will be vitiated on the ground that a person who has taken part or assisted in adjudicating upon them was in law incapacitated by interest from doing so.

[17] 58 years later, in *The King v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259, Lord Hewart in his famous and often-quoted dictum said:

> … but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[18] In *Regina v Camborne Justices and another, ex p Pearce* [1955] 1 QB 41, Slade J, in endorsing and applying the decision of Blackburn J in *The Queen v Rand*, said at p 42:

> … that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, *a real likelihood of bias must be shown* not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his enquiries. (Emphasis added.)

[19] However it is interesting to note that Slade J also commented and cautioned on Lord Hewart's dictum in *The King v Sussex Justices, ex p McCarthy*, that:

> Whilest endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the errorneous impression that it is more important that justice *should appear* to be done than it *should in fact* be done. (Emphasis added.)

[20] Later in, *Metropolitan Properties Co (FGC) Ltd v Lannon and others; Regina v London Rent Assesment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577 at p 599, Lord Denning MR said:

> In *Reg v Barnsley Licensing Justices, ex parte Barnsley and District Licensed Victuallers' Association* [[1960] 2 QB 167, 187; [1960] 3 WLR 305; [1960] 2 All ER 703], Devlin J appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity.

It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg v Huggins* [[1895] 1 QB 563]; and *Rex v Sunderland Justices* [[1901] 2 KB 357], per Vaughan Williams LJ. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg v Camborne Justices, ex parte Pearce* [[1955] 1 QB 41; [1954] 3 WLR 415; [1954] 2 All ER 850]] and *Reg v Nailsworth Licensing Justices, ex parte Bird* [[1953] 1 WLR 1046; [1953] 2 All ER 652]. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'.

[21] In Malaysia, applying the principle enunciated in the case of *Metropolitan Properties*, the Court of Appeal in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 at p 228, concluded as follows:

There may be cases in which it would be desirable that the trial judge or the judge who heard an application at an interlocutory stage should not sit at a later stage of the proceeding. The principles applicable for disqualification are that which I have stated in this judgment. It is that the law will not suppose a possibility of bias in a judge hearing the case whose authority greatly depends on the presumption and idea that he will administer impartial justice and, any attempt at lowering his authority or to undermine or impair it would interfere with the performance of his judicial duties. To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

[22] Coming back to the position in England, the House of Lords in *Regina v Gough* [1993] AC 646 at p 670, Lord Goff said:

… Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; …

[23] In applying 'the real danger of bias' test, Lord Goff, however disagreed with Lord Denning's opinion of the hypothetical reasonable man, when he said at p 670:

Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not neccessarily be available to an observer in court at the relevant time.

[24] Not too long ago, in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No. 2)* [1999] 1 All ER 577, the House of Lords dealt with interest bias and automatic disqualification, where in disqualifying Lord Hoffmann, Lord Hutton said (at p 596):

> In relation to the allegation made by Senator Pinochet, not that Lord Hoffmann was biased in fact, but that there was a real danger of bias or a reasonable apprehension or suspicion of bias because of Lord Hoffmann's links with Amnesty International, I am also in agreement with the reasoning and conclusion of Lord Browne-Wilkinson …

[25] However, *Re Pinochet* also extended the possible category for automatic disqualification, by not limiting it to cases where a judge has a direct pecuniary interest in the outcome of the proceedings. Lord Hutton in expressing his opinion on this, said at p 597:

> However I am of opinion that there could be cases where the interest of the judge in the subject-matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.

[26] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, the Federal Court concluded that p 70:

> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man *(R v Gough* [[1993] AC 646], per Lord Goff at p 670D-E).
>
> Having given careful consideration to the matter, we prefer the test of apparent bias given in *Gough* ('the real danger of bias' test) as this will avoid setting aside judgments upon quite insubstantial grounds and the flimsient pretext of bias.

[27] The classic case on disqualification is obviously, and again an English case, of *Locabail (UK) Ltd v Bayfield Properties Ltd and another & Other Appeals* [2000] QB 451, [2000] 2 WLR 870, [2000] 1 All ER 65. The Court of Appeal consisting of Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC, heard five separate appeals, all concerning alleged judicial bias. Before dealing with the individual cases, the Court of Appeal made the following observations on the rules for disqualification:

(1) The existence of bias will be presumed, and the judge automatically disqualified where he has an interest in the outcome of the case he has to decide. Although pecuniary interest, such as a substantial shareholding in one of the companies appearing before him, was such an intrest, it need not be the only such interest. The issue was not the link with a party in the case, but whether the outcome could affect the interest. A small number of shares in a quoted company whose value would not be affected by the result of the case was not an interest requiring disqualification. The interest of a spouse, partner or family member of the judge could also be so close and direct as to be treated as that of the judge. However, a party with full knowledge of the facts could waive his objection to the judge hearing the case.

(2) Where the existence of partiality or prejudice on the part of the judge was actually shown, the litigant was entitled to have the judge removed or the judgment set aside. Actual bias, however, was both rare and difficult to prove. Disqualification of the judge, and the setting aside of any decision, would result if there was a real danger of bias. Reasonable suspicion or apprehension was not sufficient; the test was real danger. Clearly, if the judge himself did not know of the allegedly disqualifying interest, there could be no real danger of bias.

(3) A judge should not usually disqualify himself, or be disqualified for a reason based on religion, ethnic or national origin, gender, age, class, means or sexual orientation, the judge's or a member of his family's social or educational background, or employment history. Likewise a judge's previous political associations or memberships of social or charitable bodies should not result in disqualification. A party's objection to the judge could be waived if, after the judge disclosed some interest, no objection was then raised.

[28] The most relevant and pertinent part of the judgment can be read at p 480 (para 25) which reads as follows:

> 25 It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of cirucmstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or *previous political associations*, or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *KFTCIC v Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report Vol 6 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individuial could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness be unreliable, would not without more found a sustainable objection.

> In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[29] The Court of Appeal, in essence, applied the *Gough* test when it spoke of 'a real likelihood, in the sense of a real possibility, of bias'.

[30] Coming back to the Malaysian scene, the Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321, applied the 'real danger of bias test' and followed *R v Gould*.

[31] On this matter too, I also (as a guide) referred to part of *The Bangalore Principles of Judicial Conduct 2002*, of which the relevant portion reads as follows:

> Value 2: IMPARTIALITY, para 2.5 says:
>
> A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
>
> 2.5.3 the judge, or a member of the judge's family has an economic interest in the outcome of the matter in controversy:
>
> Provided that disqualification of a judge shall not be requested if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

DISCLOSURE BY COURT

[32] As indicated earlier, I was taken aback by this recuse application. Nomatter how the wordings in the application were couched, it is still tantamount to questioning my ability in discharging my judicial duty. My impartiality and integrity is on trial here. If one accepts the Judiciary as an institution of impartiality and integrity, there should not be any recuse application, especially in a non-automatic disqualification category. At a glance, it would also seem that the Judiciary itself is on trial. Like it or not, once a recuse application is filed, the judge becomes, by analogy, the 'accused' or at the very least the 'prime suspect' of the 'charge' or notion or by insinuation, of not being able to adjudicate in an impartial manner.

[33] How does a judge react or is expected to react, when faced with a recuse application? Judges cannot file affidavits in reply. They cannot defend themselves against such allegations of bias or possible bias. However, to my mind, since the judge is the subject of the allegations, surely he has the right

to disclose or make known to the litigants and their counsel of his position vis-à-vis in respect of his previous association with a political party, which in this particular case is the crux or bone of contention in the applicant's complaint.

[34] To my mind, in the spirit of fair play, the disclosure by court must be made at the earliest opportunity available, so as to give ample time and opportunity for the applicant to adduce any evidence to contradict or rebut the facts so disclosed, to support his allegation and application.

[35] In that light, at the first notification of the recuse application and upon the reasons given for the application, while in chambers, in the presence of both counsel for the litigants, I disclosed to them the following facts:

(1) that I did not hold any office in any political party since 1995, namely upon being elected as Chairman of the Kelantan Bar Committee and subsequently as an office bearer of the Bar Council. Section 46A(1)(c) of the Legal Profession Act 1976 prohibits me from holding any office in any political party;

(2) that I stood as a candidate for UMNO in the 1990 General Elections is a situation that goes back to some 14 years ago;

(3) that the so-called post of legal adviser of Kelantan UMNO is not a post or office within the party's Constitution, and that in all cases I only acted as an advocate and solicitor for litigants who happened to be members of the party. I never acted for the party;

(4) that I do not have any idea or inkling as to who are the personalities in either the plaintiff's or the defendant's companies;

(5) that I do not have any association, be it social or political or any relationship or even acquaintance with any director or shareholder of the plaintiff company;

(6) that I have not met or even knew by sight or spoken to any director or shareholder of the plaintiff company;

(7) that I have no knowledge of the Agreement or any agreement between the litigants, which is the subject matter of the case; and

(8) that my previous association with the said political party is already part of history, as in compliance with the Judges Code of Ethics, I ceased to be a member of any political party from the date of my appointment.

[36] After disclosing the abovesaid facts, I had also indicated to the learned counsel for the applicant, that in the light of the disclosure it was appropriate to obtain fresh instructions from his client, on the recuse application.

[37] Nevertheless, it seems that despite the disclosure by Court, the applicant (either with or without legal advice) is adamant to proceed with the recuse application.

APPLICANT'S CASE

[38] In his brief two page written submission, the learned counsel for the applicant submitted that the defendant company is owned by Perbadanan Menteri Besar Kelantan and that the plaintiff company is owned by Dato' Mohd Bakri bin Mohd. He said that I 'should recuse so as to avoid a possibility of bias or a perception of bias'. The reasons forwarded for such possibility or perception of bias are:

(i) both, Dato' Mohd Bakri Mohd and the presiding judge were senior members of UMNO Kelantan;

(ii) Dato' Mohd Bakri is currently a senior personality in UMNO Kelantan and that he had not stated in his affidavit that he does not personally know the presiding judge;

(iii) that the presiding judge, prior to his elevation, was lead legal counsel and spokesperson for UMNO Kelantan and was perceived or could be perceived to be a duly authorised representative of UMNO.

[39] The applicant submitted that 'in these circumstances the perception of bias or the possibility of bias may arise if the judge continues to hear and decide on matters in these proceedings'.

RESPONDENT'S CASE

[40] The learned counsel for the respondent in opposing the recuse application submitted at length and the salient points are:

(i) the pleadings and issues in the case had nothing to do with Malaysian politics or Kelantan politics, but are limited to seeking court's interpretation of an agreement dated 2 April 1999, signed between the parties;

(ii) that the judge's involvement as a candidate in the general elections was in 1990 and that after 1990, he never stood in any general elections;

(iii) that the judge, while in practice, as an advocate and solicitor, had to discharge his duty to his clients, without fear or favour; and

(iv) that the issue of politics is irrelevant to the proceedings, as this case involves corporate identities and does not relate to any political party. That Dato' Mohd Bakri affirmed his affidavit as a company director and not as a politician.

[41] As expected, of course, learned counsel for the respondent jumped onto the bandwagon and submitted on some of the facts earlier disclosed by the court, to bolster his opposition to the application.

FINDINGS AND CONCLUSION

[42] In cases of alleged bias, and in particular, where there is an application to disqualify a judge (recuse application), such a case must be decided on the facts relevant to each case.

[43] Fortified by the cases cited above, namely the strong persuasive guides provided in *Locabail (UK) Ltd* and following the Federal Court's decision in *Mohamed Ezam*, I find that the most reasonable and correct test to be applied in a recuse application is the 'real danger of bias' test. Claims of the likelihood of bias alone are not enough. The possibility of bias must be real and apparent.

[44] On this point, I find solace in what was said by Hashim Yeop Sani FCJ, sitting as a High Court judge in *Maleb bin Su v Public Prosecutor, Cheak Yoke Thong v Public Prosecutor* [1984] 1 MLJ 311 at p 313:

> I think the correct view is also clearly stated in *Healey v Rauhina & Anor* [1958] NZLR 945 following *R v Camborne Justices, ex parte Pearce* [1955] 1 QB 41 in that if a bias is alleged (other than pecuniary or proprietary bias), then there must be proven a *real likelihood* of bias and that reasonable suspicion of bias is insufficient. Thus, bare allegations (as done in the present case) are insufficient. A fortiori bare allegations before hearing had hardly commenced.

[45] On the subject matter too, I have had the opportunity to read the judgment of my learned sister, YA Zainun Ali J in *Tan Kim Hor v Tan Chong & Motor Co Sdn Bhd & Ors* [2003] 2 MLJ 278, and agreed with her conclusions therein.

[46] Applying the law to the facts of the application before me, as disclosed by the respective affidavits and after reading the written submissions filed herein, I conclude that the applicant has failed to prove or even show on a balance of probability, any valid or reasonable reason for me to recuse from hearing and determining all further proceedings in this case.

[47] I cannot imagine what would happen, if I were to accede to the submissions of the applicant, namely the alleged previous political association that will give rise to possibilities of bias and perception of bias. Counsel speaks of possibilities and perception. Such accession will lead to a bizarre and ridiculous situation. Imagine there are about 3 million UMNO members in the country and an equivalent membership in other political parties who are in opposition to UMNO, I cannot hear cases involving 6 million people. I have to recuse every day!

[48] Judges are not robots; they are human beings too and they are not supposed to reside in ivory towers. Humans do interact, associate and have relationship with fellow humans. The issue on recusal will only be relevant if such interaction, association and relationship do create a real likelihood of bias, in the event the judge having to adjudicate on matters involving such people. If in the first place there is no such interaction, association or relationship, how can the bias or the shadow of bias or the possibility of bias comes into existence? The likelihood of bias is not of possibilities or conjectures, it must be real. This is the situation of the recuse application before me. The applicant's stance is akin to the Malay proverbs 'takut akan bayang-bayang' and 'takut di hantu terpeluk ke bangkai', ie to fear something that does not exist.

[49] A fortiori, if I were to readily accede to such an application, I will be failing in my judicial duty, and such failure may even be tantamount to an abdication of my judicial duty. The other school of thought that supports my decision in this application is that any accession to such frivolous and groundless application will give rise to the notion that by seeking the disqualification, the applicant will have his case tried by someone thought to be more likely to decide in his favour. After all, the famous dictum of 'justice must not only be done but should manifestly and undoubtedly be seen to be done' is a double-edged blade.

[50] Furthermore, logistically, do we have enough judges in the country to step in every time another judge has to decline from a case? What more, when a judge is constitutionally bound to decide on disputes before him fairly and to deliver judgment in accordance with law and the evidence presented in the proceedings. That, in fact, is the fundamental element of judicial duty as expounded in the oath of office of every judge.

[51] May it be reminded too, that in discharging his duty, a judge is governed by The Judges' Code of Ethics 1994 (PU(B) 600), a subsidiary legislation, made pursuant to cl (3A) of Art 125 of the Federal Constitution. To have a glance of the code, let me quote in particular, part of Code 3(1) of The Judges' Code of Ethics 1994, which, *inter alia*, reads as follows:

> 3.1 A judge shall not-
>
> (a) subordinate his judicial duties to his private interests;
>
> (b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties;
>
> (c) conduct himself in any manner likely to cause a reasonable suspicion that-
>
> (i) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or
>
> (ii) he has used his judicial position for his personal advantage;
>
> (d) conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto;

[52] Therefore the reasonableness of the existence of the real danger of bias has to be assessed in the light of the Judges' Code of Ethics 1994 and the oath of office taken by judges to administer justice without fear or favour. Such assessment must also be viewed with the judges' ability to carry out that sacred oath vis-à-vis their training and experience. The oath of office, if it needs reminding, is a solemn declaration and undertaking to discharge the judicial duties in that office. I have a duty to sit in any case, and since this is a case of non-automatic disqualification category, I am not obliged to simply recuse myself, just because there is such an application.

[53] As such, with a clear conscience, I find no reasonable reason or excuse to recuse. I therefore dismiss this recuse application, with costs.

Recuse application dismissed with costs.

Reported by Jeyanthi Mala